

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel,)
W.A. DREW EDMONDSON, in his)
capacity as ATTORNEY GENERAL)
OF THE STATE OF OKLAHOMA,)
et al.)
Plaintiffs,)
V.) No. 05-CV-329-GKF-PJC
TYSON FOODS, INC., et al.,)
Defendants.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HAD ON AUGUST 18, 2009

MOTION HEARING

BEFORE THE HONORABLE GREGORY K. FRIZZELL, Judge

APPEARANCES:

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20 For the Tyson Foods
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(CONTENTS CONTINUED)

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PROCEEDINGS

August 18, 2009

THE COURT: Be seated please.

THE CLERK: We're here in the matter of Attorney
 General State of the State of Oklahoma, et al. -- excuse me,
 State of Oklahoma, et al. vs. Tyson Foods, Inc., et al.,
 05-CV-329-GKF. Will the parties please enter their appearance.

MR. BULLOCK: Louis Bullock for the State of Oklahoma.

MS. FOSTER: Kelly Foster, the State of Oklahoma.

MR. NANCE: Bob Nance for the State of Oklahoma.

MR. BAKER: Fred Baker for the State of Oklahoma.

MR. GARREN: Rick Garren, the State of Oklahoma.

MR. RIGGS: David Riggs, the State of Oklahoma.

MS. XIDIS: Claire Xidis, the State of Oklahoma.

MR. TUCKER: John Tucker and Theresa Hill and Del
 Erich for the Cargill defendants, Your Honor.

MR. BASSETT: Woody Bassett and Vince Chadick for the

1 Eagan very sensibly rejected that argument.

2 Then the next slide. Talking about the knowledge --
3 and this is an important point, if these defendants are
4 seriously going to contest what they know.

5 THE COURT: All right before we move on from
6 necessary. Certainly poultry waste is a necessary result of
7 growing chickens. What of the point when Mr. Jorgensen argues
8 here that nuisance is not a necessary result of spreading
9 poultry litter, and in that regard is the state ready to
10 stipulate and agree that state regulation pertaining to the
11 spreading of poultry waste is inherently ineffective?

12 MR. NANCE: That is a question that assumes the only
13 state regulation is the Nutrient Management Plan scheme,
14 because the state regulation says there shall be no runoff.
15 And you-all discussed that in connection with another motion
16 earlier.

17 THE COURT: Right. But by making the arguments you're
18 making, are you saying that you are incapable, you the State
19 are incapable of preventing runoff, although you allow it to be
20 done?

21 MR. NANCE: Are we incapable. Let me think...

22 THE COURT: In other words, you are seeking an
23 injunction against the defendants to prohibit them from
24 spreading poultry litter in this watershed; correct?

25 MR. NANCE: Specifically from allowing any runoff,

1 which is, I think, as a practical matter going to be either a
2 completion cessation or very severe restriction because the law
3 prohibits runoff. And in this watershed particularly, runoff
4 is inevitable because of the things that we've discussed about
5 the geology and the slope and all of that.

6 THE COURT: All right. So you're admitting that in
7 some cases then the complete cessation is not necessary if
8 runoff is not the necessary result or runoff doesn't occur;
9 correct?

10 MR. NANCE: I don't know that I'm admitting that, Your
11 Honor, I didn't intend to.

12 THE COURT: All right, so which is it, are you seeking
13 the complete prohibition of the spreading of poultry waste or
14 are you saying that some spreading is allowable as long as
15 there is no runoff?

16 MR. NANCE: We're seeking the complete cessation of
17 spreading.

18 THE COURT: All right. So, therefore, the allowing
19 the spreading of poultry litter is inherently ineffective.

20 MR. NANCE: I'm sorry, Your Honor, I was listening to
21 the wrong person in your courtroom, I apologize. If I could
22 have that question again?

23 THE COURT: So are you agreeing that state regulation
24 here with respect to the spreading of poultry litter is per se
25 ineffective?

1 MR. NANCE: It's ineffective to the extent that there
2 is runoff.

3 THE COURT: But you're saying that short of complete
4 cessation that there is going to be runoff, in other words,
5 there is no regulation that would be effective.

6 MR. NANCE: Well, the part of the regulation that is
7 effective, and that's the part we're trying to enforce, is the
8 no runoff part.

9 THE COURT: All right. But you're saying that the
10 only way to prevent runoff is to completely cease the spreading
11 of poultry litter; correct?

12 MR. NANCE: We want a cessation so -- a cessation of
13 any runoff is what we are after, Judge.

14 THE COURT: You're avoiding my question, Mr. Nance.
15 So you're saying that some poultry waste can be spread as long
16 as it's done properly and runoff would not occur; is that
17 correct?

18 MR. NANCE: Your Honor, we think based upon the facts
19 that Mr. Baker has shown you, the evidence is that runoff is
20 inevitable or virtually inevitable. Now we're enforcing a
21 scheme here particularly in the State of Oklahoma part of the
22 watershed which says there shall be no runoff. It might be
23 demonstrated by Mr. Jorgensen or by the defendants that there
24 is some place where it could properly be applied and not cause
25 runoff, but the overwhelming amount of the time is it's going

1 to cause runoff and it would be a rare and wonderful thing
2 where it did not. So that's probably as good an answer as I
3 can give you to your question and I hope it's a satisfactory
4 one because the prohibition is on runoff. And the whole
5 Nutrient Management Plan argument -- if I can use an analogy.
6 I drove here from Edmond this morning and there are speed limit
7 signs posted all along the turnpike and the speed limit unless
8 it tells you different for construction is 75 miles an hour.
9 But the law also says you cannot drive in a manner that is -- a
10 speed that's excessive under the circumstances or is dangerous
11 under the circumstances. That is also the law and you can't
12 blow through a construction zone or you can't blow through an
13 icy patch at 75 miles an hour and think you are protected
14 because you're not. And the circumstances in this watershed
15 are that over the overwhelming majority of the times there's
16 going to be runoff. And so you can't say but the speed limit
17 is 75 because you've told me the speed limit over here is 75, I
18 can do 75. You can't. And the Nutrient Management Plan that
19 Ms. Foster showed you the other day has the requirement in that
20 you obey all the other laws. And so it's not a defense and
21 it's not a permission.

22 THE COURT: But you're are saying except in the rare
23 circumstance adherence to the Nutrient Management Plan is going
24 to result in runoff, and but for that rare circumstance
25 everyone is violating the law?

1 MR. NANCE: I think that's correct. But we're suing
2 the defendants, we're not suing all of these farmers. We think
3 the defendants have the obligation under 427B and other
4 theories to control the waste that their birds present. It's
5 not -- it's not an action against the farmers or it's not an
6 action against the people that the farmers give the waste to.
7 It's an action against these defendants whose birds create the
8 waste and they have, we believe, the legal responsibility to
9 properly dispose of that waste and we don't even get to the
10 Nutrient Management Plan part.

11 THE COURT: What of Mr. Jorgensen's related argument
12 that state authorization prevents the State from seeking an
13 injunction here?

14 MR. NANCE: The State does not authorize pollution of
15 the water. In fact, the State prohibits pollution of the
16 water. If you look at Section 50, or Title 50, Section 4 which
17 says that anything done under a statute is not a nuisance.
18 What is done here that is a nuisance is the pollution of the
19 water, or under other statutes like 2-6-105, placing waste
20 where it's likely -- there's a preventive aspect of this --
21 where it's likely to get in the water. And likely is the
22 language from 427B as well. And Mr. Jorgensen didn't come up
23 here and present any evidence that says it's not likely. He
24 says they have experts and they have studies but they are not
25 in this record and on the record that's before you it is likely

1 Maschi M-A-S-C-I, 53 S.Ct. 599, 601. The cases are many in
2 which a person acting outside the state may be held responsible
3 according to the law of the state for injurious consequences
4 within it. The liability is commonly imposed under
5 circumstances for maintenance of a nuisance.

6 So it's clear that common law can get conduct in
7 Arkansas, Oklahoma common law.

8 One other thing I neglected to mention, and if counsel
9 wants to address it he can. Their brief, their opening brief,
10 2033 says public nuisance damages must be limited to abatement.
11 They agree that there are damages for abatement. I didn't hear
12 that mentioned in the argument and with that I'll --

13 THE COURT: Didn't I decide at the motion to dismiss
14 stage that the Oklahoma statutes had no application in
15 Arkansas?

16 MR. NANCE: The Oklahoma, yes, you're correct. For
17 conduct in Oklahoma we had statutory authority.

18 THE COURT: Right. But I thought we had already
19 addressed the issue whether or not our statute had reach in
20 Arkansas.

21 MR. NANCE: You're correct.

22 THE COURT: Okay. All right, I had heard it --

23 MR. NANCE: For contact in Oklahoma we have the
24 explicit statute under our act.

25 THE COURT: Right. Okay.

1 MR. NANCE: And then we're not licensing or
2 authorizing, whatever they do in Arkansas, so it's not a
3 defense to what they are doing.

4 THE COURT: All right. Mr. Jorgensen, on that point?

5 MR. JORGENSEN: Your Honor, I have nothing to really
6 to add beyond the fact that you're correct, that you did hold
7 that the state statutory claims would not apply in Oklahoma --
8 I mean, excuse me, rather in Arkansas. And I did not address
9 abatement because of your damages ruling. We saved ourselves a
10 lot of time.

11 THE COURT: Specifically recall though we didn't
12 decide that Oklahoma common law didn't prevent a nuisance?

13 MR. JORGENSEN: That's precisely right. That's why I
14 did argue that today, Your Honor, and said time is finally here
15 on that.

16 THE COURT: I understand. Okay.

17 MR. BULLOCK: Judge, in terms of the individual
18 causation, could we join the Cargill motion on that. I know
19 they have some individual twists, but it might be more
20 efficient since there's an awful lot of overlap between the
21 individual Cargill causation and other larger causation.

22 THE COURT: Any objection to that?

23 MR. JORGENSEN: We're not prepared, Your Honor, to
24 handle it in that fashion. We divided them separately.

25 MR. BULLOCK: I thought Mr. Tucker was about to say

1 our position that for that reason the direct cause test which
2 is mandatory as to proceeding against Cargill cannot be
3 satisfied by any of the evidence. Thank you, sir.

4 THE COURT: Thank you. We'll take a quick recess.
5 We'll be back in a few minutes.

6 (Recess).

7 THE COURT: Be seated please. To defendants' motions
8 for summary judgment on counts four and five, that motion will
9 be granted in part and denied in part. It will be granted only
10 as to the Oklahoma nuisance claim as applicable to activities
11 in the State of Arkansas. It will be otherwise denied.

12 As to motion for summary judgment number 2055, that
13 motion is denied based upon the briefing and the arguments.

14 With regard to motion number 2062, that motion will be
15 denied.

16 With respect to motion number 2069 that motion
17 similarly will be denied.

18 As to motion number 2079 and Cargill's motion or
19 joinder -- well, excuse me, I'll hit that next. With respect
20 to motion number 2079, the motion for summary judgment of
21 defendant Cargill, Inc. and Cargill Turkey Production, LLC,
22 that motion will be denied and Cargill's joinder in motion
23 number 2069 which is separately docketed as motion number 2086
24 is denied.

25 We will take a closer look at trial with regard to the